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PATENT

Case 803P019



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

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| In re application of | ) | Examiner: M. Dastouri |
| | ) | |
| Allan S. Hodgson<br>Jessica M. Arnold | ) | Group Art Unit: 2723 |
| | ) | |
| MEASUREMENT OF FRUIT PARTICLES | ) | |
| | ) | |
| Serial No.: 08/879,322 | ) | |
| | ) | |
| Filed: June 20, 1997 | ) | |

RESPONSE UNDER RULE 116

Assistant Commissioner for Patents
Washington, D. C. 20231

Sir:

This paper is filed in response to the Office Action mailed August 22, 2000. From that paper, applicants respectfully believe that the Office has rejected the claims due primarily to a misinterpretation of the term "matrix" as it is used in applicants' claims and description, as well as a failure to fully appreciate the factual presentation made by the Declaration establishing a reduction to practice prior to the effective date of the only primary reference relied upon.

Referring first to the Declaration, the Office appears to take the position that the date of Exhibit "F" is critical to establishing reduction to practice of the invention. More specifically, the Office appears to state that, because Exhibit "F"

is dated after the filing date of Queisser et al, applicants have failed to establish reduction to practice prior to the filing date of this patent.

Applicants respectfully point out that Exhibits "A" through "E" of the Declaration, together with the averments of the Declaration itself, establish a reduction to practice of a "mock up" of the claimed invention before the Quesisser filing date. Exhibit "F" was provided by way of a confirmation of this reduction practice. Exhibit "F" shows all of the components of the earlier mock-up. The difference is that Exhibit "F" shows a cabinet having hinged doors on the front of the cabinet, rather than a more rudimentary cabinet of the mock up. Hinged doors are not an element of the claims.

Applicants refer especially to paragraph 9 of the Declaration which notes that Exhibit "E" reports successful testing of the claimed computer imaging method, using the mock-up apparatus. In addition, paragraph 10 of the Declaration provides specifics of the mock-up test equipment used to accomplish this successful testing. That paragraph details the features which had been reduced to practice by the time of Exhibit "E", which was prior to the effective filing date of Queisser et al. Paragraph 3 of the Declaration avers that all of these activities were made and completed in the United States of America.

Applicants respectfully observe that this Declaration thus is adequate to prove actual reduction to practice in the U.S.A. prior to the effective filing date of the Queisser et al. patent.

Applicants respectfully refer to the provisions of the MPEP in connection with Rule 131. Section 715.07 of the MPEP notes that, when reviewing a Rule 131 Declaration, the Office must consider all of the evidence presented in its entirety. Thus, the Office must consider fully paragraphs 9 and 10 of the Declaration and exhibits "A" through "E" and not merely later-dated Exhibit "F" which was provided as a confirmation of the structure found in the mock-up in respect of which applicants could find no currently existing drawing or photograph. It will be appreciated from the Declaration itself that Exhibit "F" incorporates the important features of the invention which were in existence and tested before the date of Exhibit "F", with the exception of the cabinet being hinged.

While this Section 715.07 goes on to observe that proof of actual reduction to practice does not require a showing that the apparatus actually existed and worked for its intended purpose prior to the filing date of the cited reference, applicants Declaration does in fact establish such actual existence and work-ability (inasmuch as successful tests were carried out before the effective filing date of the reference).

Finally, the penultimate paragraph of Section 715.07 points out that the averments made in a Rule 131 Declaration do not require corroboration.

Finally, the penultimate paragraph of Section 715.07 points out that the averments made in a Rule 131 Declaration do not require corroboration.

Applicants respectfully observe that the previously submitted Rule 131 Declaration, its Exhibits and the averments of applicants adequately establish reduction to practice of the claimed invention prior to the effective date of Queisser et al. Reconsideration and withdrawal of all of the present rejections are respectfully requested.

Paragraph 3 of the Office Action addresses applicants' previous arguments against the rejections made under Sections 102 and 103. Applicants respectfully refer to specific statements made in this paragraph, which appear to indicate a misinterpretation of the meaning of the term "matrix". Applicants understand the Office to consider the term "matrix" to refer to a two-dimensional array of food products. The Office appears to consider that applicants' claim "fruit particles in a matrix" is intended to refer to a matrix in a strict mathematical sense. This is not at all the case. "Matrix" is a well-recognized term of art within food processing arts. For example, the first few lines in the first full paragraph on page 1 of applicants' description refer to:

> The production of food products such as fruit fillings and toppings for use in, for example, yogurt and baked goods involves the cooking of fruit pieces with a variety of ingredients to produce a product with fruit pieces in a matrix of sugar, starch and/or other materials...the processed fruit product is cooled and packaged and may pass through piping and pumps before entering the final package.

Page 1 goes on to discuss the "Fruit Retention Test" (discussed in the prior Amendment) and contains the sentence "the food product is washed on a screen to remove the matrix." The Summary of the Invention on page 3 of applicants' description references characterizing and measuring fruit pieces, including "a filling with fruit pieces in a matrix of sugar and/or starch...".

Passages such as these in applicants' description do not warrant an interpretation by the Office that applicants' claimed "fruit particles in a matrix" is a two-dimensional array of food products. Quite the contrary, there is no "array" or "ordered" attribute of the claimed "fruit particles in a matrix." This is why applicants previously referred to the non-ordered characteristic of the matrix and the similarity in consistency between the matrix and the fruit pieces. As noted in the previous Amendment, fruit pieces in a matrix have a randomness in size and shape of fruit pieces, as well as in distribution of those fruit pieces within the matrix.

In essence, it appears as if the Office is reading the claimed language "fruit particles in a matrix" as having fruit particles which are aligned in the sense of the alignment taught by Queisser et al. Applicants are not relying merely upon the fact that Queisser et al has specific teachings with respect to only potato products (recognizing the generic "food" products wording). Applicants specifically rely on the teachings of Queisser et al about aligning the potato/food products as a series of ordered,

individual items, as opposed to food particles within a matrix as used by applicants (e.g., a jam, heavy syrup, and the like).

In order that the Office might better appreciate how the art would understand the claim language "fruit particles in a matrix", applicants enclose copies of the following publications.

1. Webster's Third New International Dictionary, 1976, includes the following in its definitions of "matrix": 2a. *"something (as a surrounding or pervading substance or element) within which something else originates or takes form or develops...".* 3. *"a mass by which something is enclosed or in which something is embedded..."* It is noted that one of the later definitions in this dictionary, namely definition 9, refers to *"one of a class of rectangular arrays of mathematical elements..."*, which is not how applicants use "matrix."

2. The American Heritage Dictionary, 2nd College Edition, 1985, has this as its first definition: *"a situation or surrounding substance within which something originates, develops, or is contained...".* Definition 8 refers to the mathematical meaning, namely *"a rectangular array of numerical or algebraic quantities treated as an algebraic entity."*

3. Kaufman, et al. U.S. Patent No. 4,952,414 is within a food art specifically mentioned in applicants' description, namely the putting up of yogurt food products. Passages in the lower third of column 2 and the upper quarter of column 3 reference the

term "matrix" as being an emulsion throughout which food pieces are dispersed. The particular matrix of this patent is discussed in some detail in columns 5, 6 and 7.

4. Gross U.S. Patent No. 4,379,796 uses the term "matrix" in the sense of "a liquid matrix such as sugar containing syrup." See, for example, line 27 of column 6.

5. In the abstract of Noffsinger et al, "Liquid chromatographic determination of polydextrose in food matrixes," Journal--Association of Official Analytical Chemists, Vol. 73, No. 1, 1990, reference is made to aqueous extraction of polydextrose from the food matrix, which is in accordance with applicants' use of "matrix".

6. The abstract of European Patent No. 00225154, Sanderson et al, refers to a gelled food product comprising a matrix, including "fruit or fish gel."

7. Chapter 7 from Processing Fruits: Science and Technology, Volume 1, 1966, Somogyi, et al, while dealing with freezing of fruit, has several references to a fruit and a matrix. For example, the description of the matrix occurs in relation to the aqueous liquid fraction at pages 172, 173, 174 and 175.

Reconsideration and withdrawal of the Section 102 rejection of claims 1, 3 and 12 from Queisser, et al. are respectfully requested. This patent does not have any teaching regarding a process or apparatus for measurement of food particles in a matrix. Instead, this patent teaches analyzing food pieces without

addressing the problems associated with having food pieces within a matrix.

Regarding the Section 103 rejections of the rest of the claims from Queisser, et al., either alone or in combination with one or more of Bolle, et al., U.S. Patent No. 5,546,475 and Sistler, et al., U.S. Patent No. 4,975,863, the secondary references are no more relevant than Queisser, et al. with respect to the "fruit particles in a matrix" as discussed herein.

Applicants respectfully believe that entry of this Response and its full consideration under Section 116 are in order. The enclosed publications are presented merely in order to confirm the meaning of "matrix" as used in applicant's description and claims as previously presented.

Respectfully submitted,

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